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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

72-1537

JACK KERSHAW

Petitioner

vs.

ELBERT D. BROOKS, DIRECTOR OF SCHOOLS, AND C. R. DORRIER, L. C. BIGGS, I. T. CRESWELL, W. J. HARBISON, MRS. IRWIN ESKIND, WALDEN S. FABRY, MRS. C. F. MAGER, FRANK T. GRISHAM, AND W. W. BERRY, MEMBERS OF THE BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals entered in the above styled case on February 14, 1973.

Opinion Below

There was no opinion of the United States Court of Appeals for the Sixth Circuit either published or unpublished. The Clerk of the Court entered an order for the Court. Said order is set out on page 9 of the Appendix hereto.

Jurisdiction

The Clerk's order was entered February 14, 1973, thus, this petition is timely filed. The jurisdiction of this Court is invoked under 28 USC, Section 1254 (1) and Rule 19 of the Supreme Court Rules.

Questions Presented

Whether or not the Fifth Amendment to the Constitution of the United States permits a United States District Court, on its own motion, to make an attorney representing a party litigant in another proceeding before another tribunal, a party defendant to a "motion for temporary restraining order" filed before said United States District Court.

Constitutional Provisions

FIFTH AMENDMENT: CAPITAL CRIMES; DOUBLE JEOPARDY: SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentation or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; *nor be*

deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statement of Case

On February 22, 1972, the Concerned Parents Association Inc. et al, filed a declaratory judgment suit in the Chancery Court of Davidson County, Tennessee. Said action sought to have the rights of the plaintiffs declared as to the implementation, by the defendants named in said action, of the orders of the United States District Court for the Middle District of Tennessee, Nashville Division in the case of Robert W. Kelley, et al vs. Metropolitan County Board of Education. Said complaint had asked for injunctive relief both by temporary and permanent injunction as follows:

"The plaintiffs aver that they are entitled to a temporary injunction prohibiting the defendants, or any of them, from requiring any student to attend any particular school against the will of such student or his parents, or assigning any student to any school so far from his home that he must spend more than half an hour in transit and awaiting transportation under normal operating conditions, or assigning more pupils to distant schools than can be transported with present buses properly maintained with adequate reserves for breakdowns in normal school hours, and further prohibiting the defendants from withholding from pupils and parents full and truthful information with respect to violence and threats thereof at any school to the end that parents and pupils may be able to make an informed judgment for themselves whether they are willing to incur the risks of complying with assignment to such schools.

They further aver that upon the final hearing they are entitled to have such injunction made permanent with addi-

tional provisions prohibiting the defendants from misusing educational funds to support excessive busing, from making any pupil assignments on any basis other than educational criteria developed upon a sound development of facts by qualified specialists, and from making any assignments or imposing or withholding any discipline on racial grounds, together with such other provisions as may appear necessary upon the hearing to protect the rights of the plaintiffs and members of their classes.

The plaintiffs aver that unless such injunctive relief is granted, they and each of them will be irreparably damaged because of deprivation of their constitutional rights and the denial of proper and timely educational opportunities for continuously growing pupils, and that in the absence of such injunctive relief the risk of death or serious bodily harm or disease will continue to increase and may actually be realized before a final resolution of the issues herein.

They further aver that they have no plain, speedy or adequate remedy at law or otherwise for the wrongs complained of herein."

The temporary injunction was never sought by the plaintiffs to that action nor was there ever a hearing before the Chancery Court in regard thereto.

There was no responsive pleading filed by the defendants to Chancery Court case although much time and leniency was given said defendants to do so. Finally, in an effort to require said defendants to take some action so as to allow the case to proceed, the plaintiffs filed a motion for default judgment. This motion was heard at 9:00 a.m. on April 7, 1972. The Court granted the motion for default judgment because the defendants had been served more than thirty (30) days from the date of the hearing of the motion but had not filed a responsive pleading (46A and 47A).[1] However, the order granting a default judgment was not entered (48A).

[1] Reference to page numbers apply to the Appendix heretofore filed before the United States Court of Appeals for the Sixth Circuit.

On the same day, April 7, 1972, the defendants in the Chancery Court case, filed a new suit styled, "Motion for Temporary Restraining Order" before the United States District Court, Middle District of Tennessee, Nashville Division (4A).

On the same date, without notice, Honorable L. Clure Morton, Judge of the United States District Court, Middle District of Tennessee, issued a temporary restraining order against the Appellants and on his own motion, made the Appellant Kershaw a party defendant. Said order set the cause for hearing on the 14th day of April 1972 at 8:00 a.m. (25A).

To this order, the Appellant Kershaw filed a motion to dismiss. (34A)

This motion was denied and a permanent injunction issued against Appellant Kershaw as follows:

"Therefore, the named defendants to this action and any and all attorneys whom they may employ are hereby permanently enjoined from filing any additional documents, papers, requests, injunctions, pleadings, or making any oral requests in the cause styled The C.P.A., Inc. et al vs. Elbert D. Brooks, Director of Nashville, Metropolitan Schools, et al, No. A-1298, in the Chancery Court of Davidson County, Tennessee. In particular the defendants and each of them and any and all attorneys whom they employ are specifically enjoined from seeking any injunction or restraining order which has the effect of modifying or attacking the orders entered in the United States District Court for the Middle District of Tennessee in the case entitled Robert W. Kelley, et al vs. Metropolitan County Board of Education. Furthermore, the defendants and each of them and any and all attorneys whom they may employ are enjoined from taking any action of any kind or character which interferes with the implementation of the orders of the United States District Court for the Middle District of Tennessee in the

case of Robert W. Kelley, et al vs. Metropolitan County Board of Education."

At the hearing on April 14, 1972, there was read into the record, by the Honorable L. Clure Morton, a previously prepared document setting forth facts of which the Court would take judicial knowledge. (36A)

The Court then asked counsel for petitioner, Kershaw, if there was any question that the attached complaint (meaning the complaint filed in Chancery Court) was a true and correct copy. To this question, counsel replied, "No questions, Your Honor". (44A)

There is nothing in the record that says that Petitioner Kershaw himself or his counsel agreed with the findings of the Court as alleged on Page 5 of Respondent Brook's brief.

It was contended by respondents that the District Court's jurisdiction is based upon Title 28, Section 2283 of USCA. This is denied by petitioner.

Argument

Certiorari should be granted in this case because the Court of Appeals failed to address itself to the issues presented it and further, failed to apply the existing law to said issues. Said issue and the purpose of this petition by this petitioner is whether his constitutional rights were violated when the United States District Court made him a party litigant to this case, and enjoined him from representing his client.

When Respondent Brooks filed his "Motion for Temporary Injunction", he did not make the petitioner Kershaw, a party defendant in the caption of the motion. It was proper that the motion be styled as it was, and that the petitioner, Kershaw,

remain in the position of attorney for the respondents. However, the first statement of the order (25A) granting a temporary injunction issued by the District Court immediately stripped the petitioner, Kershaw, of any authority to represent his clients in the hearing on the "Motion for Temporary Injunction" or any other matter involving the issues raised in that cause.

If the only purpose in making petitioner Kershaw personally and by name a party defendant to the "motion" was to bind him as attorney for his client to said motion, then such action was then, and is now totally superfluous. Rule 65 upon which the District Court action is based (72A and 73A) plainly says in Section (d) thereof, that attorneys of the restrained parties are bound by any injunction issued by the District Court.[2]

The reason that Petitioner Kershaw was made a party defendant to the "motion" heretofore, could only be to remove him automatically from any position of representation of his clients. This was done without an opportunity to defend such action and without his consent and was in violation of his constitutional rights.

The case of In re: Baxter, Fed., Cap. No. 1,118 5 AM Law Reg N.S., 159, note says:

> "The right of an attorney to practice his profession is his property . . . . . "

The District Court has denied the petitioner, Kershaw, his

[2] Section (d) of Rule 65 is as follows: "Form and scope of injunction or restraining order–every order granting an injunction and every restraining order shall set forth a reason for its issuance; shall be specific in terms; shall describe in reasonable details; and not by reference to the complaint or other documents, the act or acts sought to be restrained; and is binding upon the parties to the action, their officers, agents, servants, employees, and *attorneys*, (emphisis supplied) and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

property rights without due process by summarily making him a party litigant and thereby stripping him of his ability to represent his client without fear of contempt from the Court.

Thus, petitioner has been deprived of his property without due process of law in violation of the Fifth Amendment of the United States Constitution.

Regardless of what effect or to what extent the injunction has upon the petitioner, Kershaw, because he was made a party litigant, the fact remains that he is affected. Whether the effect is great or small, significant or insignificant, the effect is unnecessary, illegal, capricious and indicative of an attitude toward him that is prejudicial.

The merits of the State Court proceeding or the lack of same, should not be confused or combined with the rights of the petitioner. Whether the State Court proceeding was a threat to the orders of the United States District Court has nothing to do with the rights of this petitioner.

The threat that is made to all practicing attorneys by the action of the United States District Court and the Court of Appeals is directly and immeasurably detrimental to our system of justice. If a Court on its own motion can restrain an attorney representing a party litigant by making said attorney a party litigant himself we have destroyed forever the adversary system of justice. Such action by the Court forces attorneys into a predetermined mold designed by the Court and from which there is no escape.

Unless this Court grants the Writ of Certiorari as prayed for herein, this petitioner is cut off from exercising his property rights without recourse of any kind. Surely the time has not come that our Judicial System no longer will allow to be uttered that with which it may disagree. Surely this Court will not allow abritrary and unnecessary power to be wielded by a

lower Court that suppresses the opinion of parties' litigant and denies them the right to be represented by counsel of their choice. Surely we have not degenerated to the point that our Courts are closed to the public, or that citizens cannot seek redress for alleged wrongs committed against them in any Court of their choice having competent jurisdiction. We must at all cost in order to maintain the law and order of this nation, keep our Courts open and the lawyers practicing before those Courts free to represent the cause of their clients. When the day comes that such freedom is denied lawyers and this denial is supported by the Courts of this land, and particularly this Court, then, the freedom of this land, the greatness of its judicial system we follow and the independence of the people we serve will cease to exist.

The cause of this petitioner transcends all issues involved in the cases that cause the matter to come before this Court. Even if it be conceded that the State Court case enjoined by the District Court constituted an interference with the District Court's orders, it was still completely unnecessary to make the petitioner a party defendant. The District Court could have accomplished everything it felt necessary to protect its orders without denying the petitioner his property right without due process.

Therefore, the petitioner submits that the action of the United States District Court was designed to suppress the petitioner and to deny his clients, counsel of their choice. The petitioner further submits that the United States Circuit Court of Appeals did not address itself to this basic proposition. The order entered by the Clerk shows by its brevity and silence that the Court did not consider the rights of the petitioner. If it did consider them, it concurred in the Trial Court action.

In the words of Rule 19 of this Court, the petitioner charges that the United States District Court for the Middle District of

ville and the United States Circuit Court of Tennessee at Nashville
th Circuit:
Appeals for the Sixth C

departed from the accepted and usual course
"have so far de
roceedings, or so far sanctioned such departure
of judicial proce
Court, as to call for this Court's power of
by a lower Cor
supervision."

Conclusion

For the reasons se set forth above, certiorari should be granted.

Respectfully submitted,
Res

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Nas
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Att

Order and Opinion of the United States District Court
For The Middle District of Tennessee

APRIL 28, 1972

In the United States District Court For The
Middle District of Tennessee
Nashville Division

ELBERT D. BROOKS, et al

vs.

THE CONCERNED PARENTS
ASSOCIATION, INC., et al

Memorandum and Order

Upon hearing of this motion for preliminary injunction the court took judicial notice of the following matters which provide the background history of this action and which defendants conceded to be accurate.

"City Schools

"The first desegregation case, styled *Kelley v. Board of Education of the City of Nashville*, Civil No. 2094, was filed in the United States District Court for the Middle District of Tennessee on September 23, 1955. The court subsequently held that the City of Nashville was guilty or

segregation. *Kelley v. Board of Education of* compuls *Nashville*, 159 F. Supp. 272 (M.D. Tenn. *the Cit* 1958).

"No a al was taken from this holding of compulsory segregati and a grade a year plan was subsequently approve

"County hools

"The e of *Maxwell v. Board of Education of Davidson unty*, Civil No. 2956, was filed in the United States D ct Court for the Middle District of Tennessee on Septe er 19, 1960. The court subsequently held that Davidson unty was guilty of compulsory segregation. *Maxwell* oard of Education of Davidson County 203 F. Supp. 76 M.D. Tenn. 1960).

"No ap al was taken from this holding of compulsory segregatio

"Consolid d Cases

"By or of September 10, 1963, the county and city cases we consolidated and the Metropolitan School Board eve ally became the defendant therein.

"On Ju 16, 1970, my predecessor as district judge once agai ound Nashville and Davidson County guilty of continuing egregation and set forth the affirmative duty of abolishg dual school systems 'at once.' *Kelley v. Metropolit County Board of Education*, 317 F. Supp. 980 (M.D Tenn. 1970). No appeal was taken from the holding th Nashville and Davidson County were guilty of compulsor segregation.

"It has thus been adjudicated on two occasions that Nashville and Davidson County were guilty of *de jure* segregation in their schools. When this judge assumed the bench, this was the status of the record.

"On December 18, 1970, the Sixth Circuit Court of Appeals ordered the present district judge to implement a plan to establish a unitary school system. It was suggested in the opinion [by reference to the case of *Carter v. West Feliciana Parish School Board*, 396 U. S. 290 (1970)] that this plan should be implemented in a time period not to exceed eight weeks.

"On April 20, 1971, the Supreme Court of the United States issued its opinions in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U. S. 1 (1971) and *Davis v. Board of School Commissioners*, 402 U. S. 33 (1971).

"On June 28, 1971, this court issued its opinion. This opinion was deliberately couched in simple and uncomplicated language which should be readily understandable by the average layman. A unitary school system was established. There was no requirement for a fixed racial balance. There was no requirement for the use of bussing for the purpose of achieving a racial balance. There was the elimination of all black schools and the establishment of a unitary school system. A copy of this opinion is attached hereto as Exhibit A.

"This decision was appealed to the Sixth Circuit Court of Appeals. The appeal attacked the plan but not the fact that Nashville and Davidson County, until the compliance with this court's opinion, had been guilty of compulsory segregation in the schools.

"State Proceedings

"On February 22, 1972, the case of *C.P.A., Inc. v. Elbert D. Brooks, Director of Nashville Metropolitan Schools, et al.*, No. A-1298, was filed in the Chancery Court of Davidson County, Tennessee. The attorneys of record for the plaintiffs are Jack Kershaw and Philip M. Carden. A copy of the original bill in the Chancery Court is attached to the original complaint in this cause.

"A perusal of the bill reflects that declaratory relief and injunctive relief are sought.

"As to the declaratory relief, the state court is requested to determine whether or not *de jure* segregation exists in the Metropolitan school system, to interpret the federal law and determine whether the decree of the United States District Court for the Middle District of Tennessee is void, and to determine whether or not the defendant Metropolitan School Board, in complying with the federal court order, is acting arbitrarily and capriciously.

"As to the injunctive relief, the state court is asked to prohibit the defendant in the state action from complying with the order of the United States District Court for the Middle District of Tennessee."

On Friday, April 7, 1972, the Chancery Court, Part II, of Davidson County, entered a default judgment in favor of plaintiffs to that action. On motion of defendants to that action, this court entered a temporary restraining order restraining *inter alia* "any action of any kind or character which interferes with the implementation of the orders of the United States District Court for the Middle District of Tennessee in the case of *Robert W. Kelley, et al. v. Metroplitan County Board of Education.*" In its opinion in *Kelley*, this court, in compliance with the law as set forth by the United States Supreme Court

and the directives of the Sixth Circuit Court of Appeals, ordered the establishment of a unitary school system in Metropolitan Davidson County.

In their complaint in the Chancery Court proceeding, No. A-1298, at pages 14, 15 the principal relief sought by plaintiffs to that action is the following.

X

"The plaintiffs aver that they are entitled to a temporary injunction prohibiting the defendants, or any of them, from requiring any student to attend any particular school against the will of such student or his parents, or assigning any student to any school so far from his home that he must spend more than half an hour in transit and awaiting transportation under normal operating conditions, or assigning more pupils to distant schools than can be transported with present buses properly maintained with adequate reserves for breakdowns in normal school hours, and further prohibiting the defendants from withholding from pupils and parents full and truthful information with respect to violence and threats thereof at any school to the end that parents and pupils may be able to make an informed judgment for themselves whether they are willing to incur the risks of complying with assignment to such schools.

"They further aver that upon final hearing they are entitled to have such injunction made permanent with additional provisions prohibiting the defendants from misusing educational funds to support excessive busing, from making any pupil assignments on any basis other than educational criteria developed upon a sound development of facts by qualified specialists, and from making any assignments or imposing or withholding any discipline on racial grounds, together with such other provisions as may

appear necessary upon the hearing to protect the rights of the plaintiffs and members of their classes.

"The plaintiffs aver that unless such injunctive relief is granted they and each of them will be irreparably damaged because of deprivation of their constitutional rights and the denial of proper and timely educational opportunities for continuously growing pupils, and that in the absence of such injunctive relief the risk of death or serious bodily harm or disease will continue to increase and may actually be realized before a final resolution of the issues herein."

Further, plaintiffs to the Chancery action sought a permanent injunction upon final hearing of the matter in accordance with the above Section X. Also, certain declaratory relief was sought.

A default judgment was entered which purported to give the relief sought.

"A judgment taken by default is conclusive by way of estoppel in respect to all such matters and facts as are well pleaded and properly raised, and material to the case made by declaration or other pleadings, and such issues cannot be relitigated in any subsequent action between the parties or their privies." *Taylor v. Sledge,* 110 Tenn. 263, 75 S.W. 1074, 1075 (1903).

"A judgment by default is as conclusive as one rendered in a case where defendant appears as to all matters properly in issue." *Beare v. Burnett,* 162 Tenn. 610, 39 S.W.2d 737 (1931).

It is obvious that plaintiffs to the Chancery action were attempting to defeat and destroy the order of this court in *Kelley*, which order had the effect of establishing a unitary school system as required by the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. It

should be obvious to anyone with a basic knowledge of the law that the Chancery Court had no legal authority to so interfere with the order of this court in *Kelley*.

Section 2283 of Title 28 of the United States Code provides in full:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, *or where necessary in aid of its jurisdiction, or, to protect or effectuate its judgments.*" (Emphasis supplied).

The court holds that § 2283 is controlling here. The default judgment is in direct conflict with the prior order of this court in *Kelley*. The default judgment with the injunctive relief provided for would have the effect of unlawfully wresting jurisdiction of the *Kelley* case from this United States District Court where the case was properly instituted and decided, jurisdiction being retained. Furthermore, an injunction against the operation and maintenance of a unitary school system, as provided for in the default judgment, would effectively defeat and destroy the judgment of this court in *Kelley*.

The authority is clear that under § 2283 a United States District Court may prevent such a nullification of its jurisdiction and judgment by the injunctive process. *Thomason v. Cooper*, 254 F.2d 808 (8th Cir. 1958); *Montgomery County Board of Education v. Shelton, 327 F.Supp. 811 (N.D. Miss. 1971); United States v. American Society of Composers, Authors and Publishers*, 442 F.2d 601 (2nd Cir. 1971). *See also Berman v. Denver Tramway Corp.*, 197 F.2d 946 (10th Cir. 1952).

Moreover, United States District Courts have authority to prevent interference with its integration orders and protect rights guaranteed by the United States Constitution by the injunctive process. *Bullock v. United States*, 265 F.2d 683, 691

(6th Cir. 1959), *cert. denied* 360 U.S. 909 (1959) and 360 U.S. 932 (1959), *reh'g. denied* 361 U.S. 855 (1960); *United States v. Farrar*, 414 F.2d 936 (5th Cir. 1969); *Kasper v. Brittain*, 245 F.2d 92, 95 (6th Cir. 1957), *cert. denied* 355 U.S. 834 (1957), *pet. for reh'g. denied* 355 U.S. 886 (1957); *Brewer v. Howle School District No. 46*, 238 F.2d 91 (8th Cir. 1956); *United States v. Wallace*, 218 Supp. 290 (N.D. Ala. 1963); *Mapp v. Board of Education of the City of Chattanooga*, Civil No. 3564 (E.D. Tenn. filed February 4, 1972). *See also, Montgomery County Board of Education v. Shelton, supra.*

Defendant attorneys Philip M. Carden and Jack Kershaw assert that the court should dismiss them as party defendants to this action. However, Rule 65 (d) of the Federal Rules of Civil Procedure provides that "[e]very order granting an injunction and every restraining order . . . is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." Thus, attorneys may properly be enjoined by a United States District Court.

Defendants Carden and Kershaw, as attorneys, sought and obtained from a state court a default judgment, which is now *res judicata* as to the issues involved and which, if allowed to stand, would directly contradict and interfere with a valid order of this court. Defendants Carden and Kershaw clearly must have known that the state court had no legal authority to enjoin a valid order of this court.

The court holds that defendants Carden and Kershaw are proper parties defendant to this action and should be enjoined from any further attempts to interfere with the implementation of the orders of this court in *Kelley*.

The default judgment entered in Chancery Court placed the Metropolitan County School Board in an untenable position. The school board was bound by an order of this court to implement a unitary school system, while at the same time being faced with a default judgment from a state court having

the apparent effect of enjoining compliance with the prior order of this court. This court feels that a permanent injunction should issue to halt this interference with its order in *Kelley*. It is true that ordinarily under Rule 65 of the Federal Rules of Civil Procedure a permanent injunction may not be granted upon the hearing of a motion for a temporary injunction. However, in this case no material issues of fact exist, the issues before the court being issues of law. Furthermore, another hearing would unnecessarily delay the final determination of this action and require needless effort and expense on the part of the parties. *See Standard Oil Co. of Texas v. Lopeno Gas Co.*, 240 F.2d 504, 509, 510 (5th Cir. 1957).

Therefore, the named defendants to this action and any and all attorneys whom they may employ are hereby permanently enjoined from filing any additional documents, papers, requests, injunctions, pleadings, or making any oral requests in the cause styled *The C.P.A., Inc. et al. v. Elbert D. Brooks, Director of Nashville Metropolitan Schools, et al.*, No. A-1298 in the Chancery Court of Davidson County, Tennessee. In particular, the defendants and each of them and any and all attorneys whom they may employ are specifically enjoined from seeking any injunction or restraining order which has the effect of modifying or attacking the orders entered in the United States District Court for the Middle District of Tennessee in the case entitled *Robert W. Kelley, et al. vs. Metropolitan County Board of Education.* Furthermore, the defendants and each of them and any and all attorneys whom they may employ are enjoined from taking any action of any kind or character which interferes with the implementation of the orders of the United States District Court for the Middle District of Tennessee in the case of *Robert W. Kelley, et al. v. Metropolitan County Board of Education.*

L. Clure Morton
United States District Judge

Order of the United States Court of Appeals
No.s 72-1572-73-74

United States Court of Appeals
For The Sixth Circuit

FEBRUARY 14, 1973

ELBERT D. BROOKS, et al.,

Plaintiffs-Appellees,

vs.

THE CONCERNED PARENTS ASSOCIATION, INC., et. al.

Defendants-Appellants.

Before: EDWARDS, CELEBREZZE and McCREE, Circuit Judges.

In this case the United States District Court enjoined defendants "from seeking any injunction or restraining order which has the effect of modifying or attacking the orders entered in the United States District Court for the Middle District of Tennessee in the case entitled *Robert W. Kelley, et al. vs. Metropolitan County Board of Education.*"

In this court's affirmance of the District Court judgment in the above-styled case, this court pointed to the availability of the District Court for consideration of any problems arising subsequent to the entry of the desegregation order concerned:

> The District Court order in this case specifically retained jurisdiction. Thus, upon our affirmance, the door of the District Court is clearly open (as it has been!) to the

parties to present any unanticipated problems (not resulting from failure to comply with its order) which may have arisen or may arisen in the future. *Kelley v. Metropolitan County Board of Education of Nashville, Tennessee*, 463 F.2d 732, 747 (6th Cir. 1972).

The judgment of the District Court is affirmed.

Entered by order of the Court

James A. Higgins
Clerk

FILE
MICHAEL RODAK, JR

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 72-1537

JACK KERSHAW,

Petitioner,

v.

ELBERT D. BROOKS, et al.,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

PETITION FOR REHEARING

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Nashville, Tennessee 37207

Attorney for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 72-1537

JACK KERSHAW,

Petitioner,

v.

ELBERT D. BROOKS, et. al.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Sixth Circuit

PETITION FOR REHEARING

The petitioner respectfully prays the Court to grant him a rehearing of this Court's action of October 9, 1973, in denying his petition for certiorari to the United States Court of Appeals for the Sixth Circuit to review a decree affirming a decree of the United States District Court for the Middle District of Tennessee.

It is respectfully submitted that the following questions not specifically set out in the previous petition should be considered, whether or not the Court desires to review the full merits:

1. Whether or not the Court of Appeals judgment should be vacated and remanded for clarification whether its order relates only to the single paragraph of the District Court's injunction quoted on the appeal

(A22)[1]—or whether it also applies to the portion that added: "Furthermore, the defendants and each of them and any and all attorneys whom they may employ are enjoined from taking any action of any kind or character which interferes with the implementation of the orders of the United States District Court for the Middle District of Tennessee in the case of Robert W. Kelley, et al. v. Metropolitan County Board of Education." (A21)

2. Whether the judgment below should be vacated and remanded for a full hearing on the merits without the defendants' original counsel being precluded from representing their clients in the federal court proceedings by the necessity of obtaining counsel for their own personal defense.

These are important questions affecting the future conduct of the petitioner and all other lawyers and questions which have never before been decided by this court or squarely decided by the courts below or any other court so far as present counsel is aware, although they have been implicit in the record from the beginning of the District Court's original precipitous action in making the petitioner a defendant on the Court's own motion.

The first question is especially important to the present petitioner's future liberty and property rights. The portion of the injunction quoted by the Court of Appeals (A.25) enjoined the defendant only from "seeking an injunction or restraining order".

The immediately following sentence of the injunction of the District Court, however, is capable of being interpreted by an angry judge in the future as applying to matters other than lititgation and to actions in capacities other than as

[1]Parenthetical references are to pages of the appendix of the original petition for certiorari.

lawyers, including efforts to obtain a constitutional amendment, or to support legislative candidates who take or promise to take actions to eliminate or ameliorate the evils of busing, as many candidates have done both before and since the injunction.

Indeed, it may be interpreted as preventing the petitioner, as lawyer or otherwise, from petitioning the school board or other state officials to take action within their continuing plenary responsibilities as stated by this court in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). This Court said in that case, *inter alia*, that:

> "[I]t is important to remember that judicial powers may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults." [402 U.S. at 16]

> "Neither school authorities nor district courts are consitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system." [402 U.S. at 31-32]

This is especially true because the original state court complaint that initiated the present proceedings, included among its legal averments the essence of the first quotation above and included the second one verbatim, as well as other portions of the *Swann* opinion as bases for the State Court inquiry into the local school board's own decisions in implementing the plan approved by the United States District Court.

THE PREMISES CONSIDERED, the petitioner prays that he be granted a rehearing on his petition for the writ of certiorari, and that upon the rehearing the writ be granted and the judgment below should be vacated and remanded for further hearing.

Respectfully submitted,

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CERTIFICATE

It is hereby certified that the foregoing petition is presented in good faith and not for purposes of delay, and that its content is restricted to grounds believed to be substantial and to be available to petitioner, although not previously presented.

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Attorney for Petitioner